

STATEMENT OF CONSIDERATION RELATING TO
907 KAR 20:100

Department for Medicaid Services
Amended After Comments

(1) A public hearing regarding 907 KAR 20:100 was not requested and; therefore, not held.

(2) The following individuals submitted written comments regarding 907 KAR 20:100:

<u>Name and Title</u>	<u>Organization/Agency/Other Entity</u>
Billy Carter	
Cara Stewart, Health Law Fellow	Kentucky Equal Justice Center
David Adams	
Kathy Adams, Director of Public Policy	Children's Alliance
Teresa C. James, Commissioner	Department for Community Based Services (DCBS)

(3) The following individual from the promulgating agency responded to comments received regarding 907 KAR 20:100:

<u>Name and Title</u>	<u>Organization/Agency/Other Entity</u>
Lee Guice, Director	Department for Medicaid Services, Division of Policy and Operations,
Marchetta Carmicle, Administrative Branch Manager	Department for Medicaid Services, Division of Policy and Operations, Eligibility Policy Branch
Stuart Owen, Regulation Coordinator	Department for Medicaid Services

SUMMARY OF COMMENTS AND AGENCY'S RESPONSES

(1) Subject: Spend-Down Policy

(a) Comment: Teresa C. James, Commissioner of the Department for Community Based Services stated the following:

"Section 6 conflicts with DMS directive to DCBS. DCBS' understanding is that spend-down policy did not change; it is not based on the federal poverty level as indicated in this administrative regulation. The Kentucky Automated Management and Eligibility

System (KAMES) does not support the federal poverty level indicated in this regulatory provision.”

(b) Response: The Department for Medicaid Services (DMS) is deleting the spend-down section from the administrative regulation as spend-down is not an eligibility option for the modified adjusted gross income (MAGI) eligibility category.

(2) Subject: Individuals Eligible for SSI Benefits

(a) Comment: Teresa C. James, Commissioner of the Department for Community Based Services stated the following:

“Section 9(3) states: ‘An individual who would be eligible for SSI benefits but has not applied for the benefits shall not be eligible for Medicaid.’ The policy was never previously discussed in joint application design (JAD) sessions to DCBS’ knowledge, and there is no known system support for the provision. Is the provision correct for MAGI Medicaid? The enforcement of the provision in the eligibility determination process would be difficult without system support. The provision may also be contrary to other federal and state initiatives to improve community integration for individuals with disabilities, including self-determination and independence, and parental choice.”

(b) Response: DMS is deleting the provisions in Section 9 via an “amended after comments” administrative regulation.

(3) Subject: Limit of Caretaker

(a) Comment: Teresa C. James, Commissioner of the Department for Community Based Services stated the following:

“Section 14(4)(b) appears to limit the inclusion of a caretaker relative to just one person. The provision would be improved if ‘one (1) other’ was deleted and ‘a’ was inserted on line 16, page 13.”

(b) Response: DMS is revising the language to as recommended in an “amended after comments” administrative regulation.

(4) Subject: Deprivation Requirement Relevance

(a) Comment: Teresa C. James, Commissioner of the Department for Community Based Services stated the following:

“Section 14(5) speaks to desertion, a deprivation factor. There is no deprivation requirement in MAGI Medicaid; thus, the purpose of this provision is unclear. It may not be applicable any longer.”

(b) Response: DMS is deleting the language as recommended in an “amended after comments” administrative regulation.

(5) Subject: Sanction of Medicaid

(a) Comment: Teresa C. James, Commissioner of the Department for Community Based Services stated the following:

“Section 14(7)(b) allows for sanctioning Medicaid for the work-eligible adult’s failure to cooperate with the Kentucky Works Program. DMS informed DCBS that this sanction would not be allowed once cases were delinked.”

(b) Response: DMS is deleting the language as recommended in an “amended after comments” administrative regulation.

(6) Subject: Relevance of Split Families

(a) Comment: Teresa C. James, Commissioner of the Department for Community Based Services stated the following:

“Section 14(8)(a) appears to be obsolete. MAGI Medicaid does not allow families to be split in order to make them eligible.”

(b) Response: DMS is deleting the language as recommended in an “amended after comments” administrative regulation.

(7) Subject: Former Foster Care Individuals

(a) Comment: Kathy Adams, Director of Public Policy for Children’s Alliance stated the following:

“Page 7, line 15 to line 18: Recommend that (6)(b)1. be clarified since “a former foster care individual” is determined eligible under 907 KAR 20:075 and not under this administrative regulation as 1. states. Also recommend striking “shall be no earlier than January 2, 2014 since (6)(b) states their retroactive eligibility period shall begin no earlier than January 2, 2014.”

(b) Response: Via an “amended after comments” administrative regulation, DMS is changing the reference to 907 KAR 20:075. The Legislative Research Commission’s Regulations Compiler eliminated the duplicative January 1, 2014 language from subsection (6)(b)1 via a “technical amendment.”

(8) Subject: Failure to Report Changes in Circumstances

(a) Comment: Kathy Adams, Director of Public Policy for Children’s Alliance stated the following:

“Page 12, line 19 to 20: Recommend that the penalty for failure to report changes in circumstance in (4) be added and that the changes required to be reported be added. Currently it is not clear what changes the individual is required to report.”

(b) Response: DMS prefers to not insert a fixed penalty into the administrative regulation for failing to report changes in circumstances.

(9) Subject: Medicaid Coverage for Individuals Over 65:

(a) Comment: Cara Stewart, Health Law Fellow for Kentucky Equal Justice Center, stated the following:

“We are concerned that this section leaves out the possible Kentuckians 65 and above who are not currently eligible for Medicare. Leaving those Kentuckians out of this section would leave that population without appropriate health care options. Kentuckians eligible for Medicare are not eligible for this Medicaid Expansion, but the qualification of 64 and younger is not based on that age, but rather the presumption of Medicare eligibility. We request you clarify that those persons ineligible for Medicare but aged 65 or older and otherwise eligible are included in this expansion would be eligible for Medicaid under these new regulations.”

(b) Response: The Affordable Care Act and the Centers for Medicare and Medicaid Services (CMS) do not grant Medicaid eligibility for individuals sixty-five (65) and over under the new eligibility categories – “MAGI” and the “Medicaid expansion” group. No federal funding is provided for individuals sixty-five (65) and over under the new eligibility categories. The eligibility rules for individuals sixty-five (65) and over remain unchanged by federal law and by CMS. The relevant codified language appears in 42 U.S.C. 1396a(a)(10)(A)(i)(VIII).

(10) Subject: General Comments

(a) Comment: David Adams stated the following:

“Expanding Medicaid as this proposed regulation attempts to do is a terrible idea with very negative fiscal implications for the Commonwealth. Statute requires administrative review of this action and same cannot legally be completed in time for a meaningful and legally required review process to be completed before the January 1 effective date. We lack funding in the current budget to pay the Medicaid administration costs immediately created by this regulation and the likelihood the legislature, which has not been consulted on this matter previously, will agree to fund more of the same in the next biennium is nonexistent.

This whole exercise has been a waste of time in contemplation of a waste of unavailable resources. We must end it now.”

(b) Response: The Department for Medicaid Services disagrees for many reasons. Not only will expanding the Medicaid Program to cover health insurance for individuals in the “expansion group” benefit hundreds of thousands of Kentuckians, but failing to implement would financially cost Kentucky.

The Cabinet for Health and Family Services thoroughly researched this matter, hired an actuarial firm to project costs associated with the initiative, and contracted with the Urban Studies Institute of the University of Louisville to perform an economic impact analysis. The results of all research estimate that without expansion over 200,000 uninsured Kentuckians would be unable to receive health insurance through the Medicaid Program or through the subsidized option available via the Health Benefit Exchange.

The analysis also estimates that “Medicaid expansion” create a \$15.6 billion economic impact spanning state fiscal years 2014 to 2021 while creating approximately 17,000 jobs in Kentucky.

More details regarding the analysis of this initiative can be viewed at the following Web site:<http://governor.ky.gov/healthierky/medicaid/Pages/default.aspx>.

(c) Comment: Billy Carter stated the following:

“I think this expansion is a bad idea. It should not occur. It may also be unconstitutional.”

(d) Response: The response in (b) above also applies to these comments.

Additionally, the Honorable Phillip J. Shepherd, Justice of the Franklin Circuit Court, Division 1, in Kentucky issued an opinion and court order on September 13, 2013 in the case of “David Adams, Et Al v. Commonwealth of Kentucky, Et Al” denying the plaintiff’s motion that Medicaid expansion was unconstitutional. Justice Shepherd’s opinion and order elaborates on how the Governor of Kentucky and the executive branch indeed possess the authority to, among other things, expand Kentucky’s Medicaid Program eligibility categories to include the Medicaid expansion group. Justice Shepherd’s court order can be viewed at the web site address of:
<http://hr.cch.com/hld/adamsvkentucky2.pdf>.

SUMMARY OF STATEMENT OF CONSIDERATION
AND
ACTION TAKEN BY PROMULGATING ADMINISTRATIVE BODY

The Department for Medicaid Services (DMS) has considered the comments received regarding 907 KAR 20:100 and is amending the administrative regulation as follows:

Section 1(1)(b)1c

Line 8

After “to”, insert “195”.

Delete “185”.

Page 7

Section 4(6)(b)1

Line 17

After “to”, insert “907 KAR 20:075”.

Delete “this administrative regulation”.

Page 7

Section 4(6)(b)2b

Line 21

After “benefits”., insert a return and the following:

(7) The documentation of citizenship requirements established in this administrative regulation shall not apply to a non-citizen under nineteen (19) years of age who is lawfully present in the United States of America.

(8) Except as established in subsection (9) of this section, a non-citizen shall be considered to be lawfully present in the United States of America if the individual:

(a) Is a qualified non-citizen;

(b) Is a non-citizen in a valid immigrant status;

(c) Is a non-citizen who has been paroled into the United States of America in accordance with 8 U.S.C. 1182(d)(5) for less than one (1) year, except for an individual:

1. Paroled for:

a. Prosecution; or

b. Deferred inspection; or

2. Pending removal proceedings;

(d) Is a non-citizen who:

1. Has been granted:

a. Temporary resident status in accordance with 8 U.S.C. 1160 or 1225a;

b. Temporary protected status in accordance with 8 U.S.C. 1254a or is an individual with a pending application for temporary protected status who has been granted employment authorization;

c. Employment authorization under 8 C.F.R. 274a.12(c);

d. Deferred action status; or

e. An administrative stay of removal under 8 C.F.R. 241;

2. Is a family unity beneficiary in accordance with Section 301 of Public Law 101-649 as amended;

3. Is under deferred enforced departure in accordance with a decision made by the President of the United States of America; or

4. Is a beneficiary of an approved visa petition who has a pending application for an adjustment of status;

(e) Is an individual with a pending application for asylum:

1.a. Under 8 U.S.C.;

b. For withholding of removal under 8 U.S.C. 1231; or

c. Under the Convention of Torture; and

2. Who:

a. Has been granted employment authorization; or

b. Is under the age of fourteen (14) years and has had an application pending for at least 180 days;

(f) Is an individual who has been granted withholding of removal under the Convention Against Torture;

(g) Is a child who has a pending application for special immigrant juvenile status as described in 8 U.S.C. 1101(a)(27)(J);

(h) Is lawfully present in American Samoa under the immigration laws of American Samoa; or

(i) Is a victim of severe trafficking in persons in accordance with the Victims of Trafficking and Violence Protection Act of 2000 [Public Law 106-386, as amended in 22 U.S.C. 7105(b)].

(9) An individual with deferred action under the Department of Homeland Security's deferred action for the childhood arrivals process as described in the Secretary of Homeland Security's June 15, 2012 memorandum, shall not be considered to be lawfully present with respect to any of the categories listed in subsection (8) of this section.

Page 8

Section 6 and Section 7

Lines 12 through 18

After "Section 6.", delete the remainder of the language in the Section 6 in its entirety and delete "Section 7."

Page 9

Section 8

Line 10

After "Section", insert "7".

Delete "8."

Page 9

Section 9 and Section 10

Line 14 through

Page 10

Line 10

After "Section", insert "8".

Delete the remainder of Section 9 in its entirety and delete "Section 10."

Page 10

Section 11

Line 14

After "Section", insert "9".

Delete "11."

Page 11

Section 12

Line 7

After “Section”, insert “10.”.

Delete “12.”.

Page 12

Section 13

Line 21

After “Section”, insert “11.”.

Delete “13.”.

Page 13

Section 14

Line 1

After “Section”, insert “12.”.

Delete “14.”.

Page 13

Section 14(4)(b)

Line 16

After “case,”, insert “a”.

Delete “one (1) other”.

After “relative”, insert “or caretaker relatives”.

Page 13

Section 14(5) and Section 14(6)

Lines 20 through 23

After “(5)”, delete the remainder of subsection (5) in its entirety and delete “(6)”.

Page 14

Sections 14(6), (7), and (8)(a) and (8)(b)

Lines 2 through 14

After met.”, insert a return and “(6)”.

Delete subsections (7) and (8)(a) in their entirety and delete “(b)”.